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NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

SPRINGDALE SCHOOL DISTRICT NO. 50
OF WASHINGTON COUNTY ..... Petitioner

v.

SHERRY GRACE, A MINOR, AND ALBERT GRACE AND JOANN GRACE, INDIVIDUALLY AND AS PARENTS OF SHERRY GRACE

ARKANSAS STATE DEPARTMENT OF EDUCATION a/k/a DEPARTMENT OF EDUCATION; STATE BOARD OF EDUCATION; WAYNE HARTSFIELD AS CHAIRMAN OF THE STATE BOARD OF EDUCATION; MRS. JAMES W. CHESTNUTT, JIM DUPREE, T. C. COGBILL, JR., MRS. ALICE L. PRESTON, HARRY A. HAINES, DR. HARRY P. McDONALD, ROBERT L. NEWTON AND WALTER TURNBOW AS MEMBERS OF THE STATE BOARD OF EDUCATION; DON R. ROBERTS, DIRECTOR OF THE DEPARTMENT OF EDUCATION ..... Respondents

ON WRIT OF CERTIORARI TO
THE EIGHTH CIRCUIT COURT OF APPEALS

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

The principal questions presented for review are:

I.

SINCE THERE WAS NO ALLEGATION THAT ANY OF THE ACT'S PROCEDURES WERE VIOLATED IN FORMULATING THE IEP, DID THE COURT OF APPEALS ERR IN UPHOLDING THE HEARING OFFICERS' AND THE DISTRICT COURT'S SUBSTITUTION OF THEIR OPINIONS FOR THOSE OF THE EXPERTS WHO DEVELOPED THE IEP?

II.

DID THE COURT OF APPEALS ERR IN HOLDING THAT TO EDUCATE A CHILD IN A ONE-ON-ONE EDUCATIONAL ENVIRONMENT SATISFIES THE "MAINSTREAMING" REQUIREMENTS OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT AND IS AN APPROPRIATE PLACEMENT?

III.

WHETHER THE COURT OF APPEALS ERRED BY NOT PROPERLY APPLYING THE DECISION OF THIS COURT IN *ROWLEY* INSOFAR AS IT MANDATES THAT A HANDICAPPED CHILD WILL REASONABLY BENEFIT FROM THE INSTRUCTIONS AND SERVICES PROVIDED.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding before the Court of Appeals and the district court.

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REASONS FOR GRANTING THIS WRIT

I.

SINCE THERE WAS NO ALLEGATION THAT ANY OF THE ACT'S PROCEDURES WERE VIOLATED IN FORMULATING THE IEP, DID THE COURT OF APPEALS ERR IN UPHOLDING THE HEARING OFFICERS' AND THE DISTRICT COURT'S SUBSTITUTION OF THEIR OPINIONS FOR THOSE OF THE EXPERTS WHO DEVELOPED THE IEP?

The thrust of the arguments raised by the respondents in regard to Point I of petitioner's request for certiorari in this case addresses substantive concerns. The arguments of the respondents miss the point of the petitioners' first contention. There has been no challenge by the respondents at any level regarding the procedures which were employed in the formulation of the IEP for Sherry Grace. The IEP, as formulated, resolves the question of placement by placing Sherry Grace in the Arkansas School for the Deaf.

As presently structured, the Act, in Section 1415 entitled "Procedural Safeguards", contemplates a review of the procedures used in formulating the IEP. Absent a procedural defect, the Act does not contemplate that the hearing officers and the appeal officer should substitute their own notion of educational policy to override or displace the IEP.

The respondents have twisted that position and stated that the school board seeks to have the IEP "stand without review from any source notwithstanding some error in procedural rights as set out in the Act." The respondents have misstated the point. No procedural error has been alleged or argued at any level. Clearly, the Act provides for the administrative process to correct such procedural defects. In the absence of a procedural defect, however, the

Act makes no allowances for substantive tinkering by the hearing officer, appeal officer or the district court.

The respondents attempt to cast aspersions upon the IEP conference and its participants by alleging their bias. The respondents, however, have not heretofore raised the issue previously, nor have they made an evidentiary record upon which to substantiate any bias. The record simply does not support the feeble attempt by the respondents to impugn the objectivity of the participants of the IEP conference.

In contradistinction, the record does reflect the lack of expertise of both the hearing officer and appeal officer. For them to substitute their own ideas with regard to any substantive issue contravenes the language of the Act and the interpretation given it by this Court in *Board of Education of Hendrick Hudson Central School District v. Rowley*, —— U.S. ——, 102 S.Ct. 3034, 73 L.Ed. 2d 690 (1982). (Hereinafter *Rowley*). This point went unanswered in the reply brief of the respondents.

Instead, the rebuttal offered by the respondents is a non sequitur. The respondents referred to the attempt by both the hearing officer and the appeal officer to obtain additional background information, in order to assist them in making their decisions. Such activities by the administrative review officers substantiates the fact that both individuals felt insecure with their knowledge of the subject. But more importantly, such activity reflects the basic lack of understanding of their role in the administrative review process as defined under the Act. Neither the hearing officer nor the appeal officer are empowered with investigative functions. Moreover, it is not their duty to make substantive decisions with regard to the placement issue. Their role is

to examine the procedures employed and to satisfy themselves that the procedures employed afforded the appropriate due process to all of the parties involved. Any activity by the hearing officer and appeal officer beyond the scope of their appointed functions is improper. Clearly, it was error for the district court and the Court of Appeals to countenance such activity by the administrative review officers.

II.

DID THE COURT OF APPEALS ERR IN HOLDING THAT TO EDUCATE A CHILD IN A ONE-ON-ONE EDUCATIONAL ENVIRONMENT SATISFIES THE "MAINSTREAMING" REQUIREMENTS OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT AND IS AN APPROPRIATE PLACEMENT?

As to Point II, the respondents raise three new arguments: (1) that the school has failed to furnish the necessary continuum of alternative placements; (2) that placement in a residential program[1] would have harmful effects on Sherry; (3) that the placement erroneously instituted by the administrative officers and countenanced by the district court and Court of Appeals is correct under the Act since things other than "academics" are to be considered.

With regard to the continuum of alternative placements referred to in 45 C.F.R. 121a.551(b)(1), the duty is placed on the public agency, which includes the state as well as the school, to furnish a continuum of placements, and the *only*

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[1]Erroneously referred to as an institutional program in respondents' brief. For difference, please see 45 C.F.R. 121a.551(b)(1), appearing at page A-158 of the petition.

placement which has been furnished by the State of Arkansas is the Arkansas School for the Deaf. The Springdale School District has furnished a continuum of alternative placements, but Sherry's situation simply requires placement at the Arkansas School for the Deaf at this time of her life.[2]

The respondents cite 45 C.F.R. 121a.552(a)(3) for the proposition that Sherry should be educated close to home. That statement is limited by Subsection (d) of the regulations, which states *harmful effects must be considered.* The respondents, in their brief, refer to this regulation and state that harmful effects will occur if Sherry is placed in a residential school. However, respondents cite no harmful effects. At the trial and the due process hearing, there were numerous harmful effects noted concerning Sherry's placement in a situation with people with whom she cannot communicate.

Dr. Merv Garretson, who not only is a deaf educator but who is himself deaf, testified that if Sherry were educated in an environment where there were little or no communications between herself and other students because of their inability to communicate, "not only would it not be of any benefit, but it might be harmful to her self-identity and create a feeling of loss and not belonging and give her a negative concept about herself." (T. 68)

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[2]The school has attempted to educate Sherry in a regular classroom, a regular classroom with support services, a regular classroom with an interpreter, and none of these options have worked. Sherry needs a modified curriculum with slower pacing than nonhandicapped children. The service now being furnished to Sherry is a special classroom, to-wit, a one-on-one situation with a certified trained teacher of the deaf. For the reasons stated in the original brief and hereafter stated, that environment is not appropriate.

Gary Blake, the Graces' expert, testified that it would not be a good situation to educate Sherry in a one-on-one environment "because children need to be with other children, and especially deaf children so that they can have role models." (T. 331) Dr. Blake stated that he would prefer not to have his child in that type of program. (T. 331-33) Dr. Blake further stated that there were many advantages to be gained from a residential school. (T. 319)

The testimony of the numerous witnesses who stated the harmful effects of one-on-one environment cannot be ignored. The respondents deride the testimony because it chronologically was given prior to the District Court order, but that does not change the testimony or its weight. As rebuttal, the respondents cite the opinion of the reviewing officer, who claims a child can adjust. Yet, the respondents fail to note the crucial fact that the reviewing officer is not trained in deaf education. How does he know? The fact is he does not know. Moreover, the stakes — a child's welfare and entire life — are far too high to be gambling upon the unfounded opinion of the appeal officer.

The respondents avoid the clear and irrebuttable fact that Sherry would be much better off, at this point in time, at the Arkansas School for the Deaf, by stating that at ASD Sherry will have no interaction with nonhandicapped children. This is totally untrue as reflected by all the testimony. Susan Pack testified that the children at the elementary school had field trips, had people come for assembly programs and present information to the children and had visits to other schools. (T. 132)

Tom Hicks, Superintendent of the Arkansas School for the Deaf, testified that there were many activities involving deaf children with hearing children, including parties such

as Valentine, Halloween and skating parties. He stated also that a calendar was put out for each week so that children would know the week's events. Tom Hicks also testified that in the sports activities that that School for the Deaf competes against hearing students in athletics.

Respondents' argument is based upon an erroneous premise that Sherry can communicate meaningfully with nonhandicapped children at Springdale. *Proximity does not equal integration*; the children at Springdale cannot sign and Sherry cannot speak. Therefore, there is no meaningful interaction.

Testimony from all the experts was that signing is not something that can be picked up easily but takes years in which to acquire any type of proficiency or ability to communicate (Tom Hicks' Testimony, T. 95-96). This testimony was corroborated by Merv Garretson who stated that people can pick up very quickly some *isolated signs, single words,* but to become fluent and to be able to communicate with other people, it takes at least three to five years, and it is necessary to constantly be among people who are skilled signers. (T. 32)

Education requires interaction, and Sherry will have no meaningful interaction with nonhandicapped children, or for that matter, with handicapped children in her one-on-one environment since she will not be able to communicate with students, her principal, the administrators or school counselors unless her certified teacher for the deaf is with her. This is simply a sentence to a life of educational isolation and is not required or allowed by the act. Not only is Sherry deprived of true academic exposure, but she is deprived of academic competition recognized as so important in *Age v. Bullitt,* 3 E.H.L.R. 551:505.

In the area of camaraderie with fellow students, handicapped or otherwise, Sherry is totally deprived of the camaraderie recognized by all of the experts who testified to be so important.

Most importantly, time after school for Sherry in communication with others will be nonexistent. Her mother possesses a limited ability to sign, but no other family member, including her father, can sign. At the Arkansas School for the Deaf, Sherry would have numerous children with whom she could sign and communicate.

The respondents have denominated a self-proclaimed "trilogy" of "concepts that holds the Education for All Handicapped Children Act together." The so-called "trilogy of concepts" is found within the regulations, not the Act itself. Each may be important but cannot be exalted as the cornerstones of the Act. The three points raised by the respondents are among many facets of the Act and its regulations. None can be singled out to the exclusion of others. Each must be applied to the facts of the case at hand.

The respondents have singled out several concepts, but fail to consider their full impact. With regard to mainstreaming, upon which they heavily rely, they ignore its true purpose. Mainstreaming was promoted as a means to preclude isolation of the handicapped child in the educational experience. The respondents refuse to recognize that the principle which lights their torch is extinguished in its present application.

III.

WHETHER THE COURT OF APPEALS ERRED BY NOT PROPERLY APPLYING THE DECISION OF THIS COURT IN *ROWLEY* INSOFAR AS IT MANDATES THAT A HANDICAPPED CHILD WILL REASONABLY BENEFIT FROM THE INSTRUCTIONS AND SERVICES PROVIDED.

The respondents improperly attempt to reduce the third contention of the petitioner to one of arguing costs. The petitioner's point is more complex than perhaps the respondents realize. The question is one of benefit. Certainly, cost is one factor to be considered when determining the efficacy of a program for any given child.

The Act does not contemplate and nor did this Court so construe the Act in *Rowley*, that handicapped children should be dumped into programs to satisfy someone's favorite catchword, be it mainstreaming or whatever. Clearly, the Individualized Education Program (IEP) is to be tailored to fit the needs of that particular child. In furtherance of the goals set forth in the IEP and in deciding whether the child is receiving a free appropriate public education under the Act, one question which must be resolved by a reviewing court as mandated by this Court in *Rowley* is whether the child is receiving benefit from the instruction. The petitioner maintains that the plan implemented by the administrative review officers does not provide Sherry Grace with the benefit necessary to satisfy the requirements of the Act.

Also, insofar as it was the congressional intent that the Act provide assistance to all handicapped children, funding cannot be ignored. This is particularly true in these times

of government fiscal belt-tightening. Indeed, at the time the Education for All Handicapped Children Act was passed, there was a certain level of funding provided through federal moneys. Those moneys have been sharply curtailed. Nevertheless, the Act imposes certain duties and responsibilities upon the state and its various local school districts. The respondents erroneously state that the petitioner lacks standing to raise the element of cost. The petitioner, as the Local Education Agency (LEA), is the agency primarily responsible for the cost of any program by the force of the Act and its regulations. It is inconceivable that the LEA should be bound by law to provide funding, but at the same time be denied the opportunity to raise the effects of such an obligation by denying its standing.

Moreover, whatever commitments the state may or may not have made in the past, does not change the wording and effect of the Act and its regulations in opposing the obligation upon the Local Education Agency. The effect of the circuit court decision as precedent is to expose the local school districts, larger or small, to the liability of funding a program of no, or marginal, benefits for a single handicapped child. Whatever the state may be committed to by way of regional programs, or other kinds of funding commitments, the fact remains that the decision of the Eighth Circuit requires the LEA to create and fund such a program. In its present posture, there is nothing to prevent the state from modifying its commitments or withdrawing support altogether in the event federal funding completely dries up. Furthermore, the past or present commitments of the state cited by the respondents can be subject to the whim of a change in administrative policy, all of which is totally beyond the control of the local school district, which

is ultimately liable for the cost of such a program as ordered in this particular case.

Contrary to the respondents' statements, the petitioner does not consider cost to be the overriding factor. The petitioner does believe that costs are relevant and should be considered in the benefit analysis mandated by *Rowley*.

In the instant case, the petitioner maintains that the plan implemented by the administrative review officers and upheld by the courts does not meet the test set down by this Court in *Rowley*.

CONCLUSION

The errors made by the Court of Appeals in deciding this case after this Court originally reversed and remanded it will set a dangerous precedent if left uncorrected. The decision of the Eighth Circuit is not consistent with *Rowley* and for that reason and all of the reasons stated herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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NO. 50 OF WASHINGTON
COUNTY, *Petitioner*

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